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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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March 18, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC. 20554

Via Messenger

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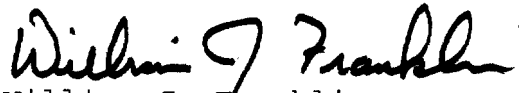
Re: **Future Development of Paging Systems**
WT Docket No. 96-18; PP Docket No. 93-253
Comments of Caraway Communications

Dear Mr. Caton:

Transmitted herewith is the original and four copies of the
Comments of Caraway Communications on the above-captioned NPRM.

Kindly contact my office directly with any questions or
comments regarding the attached.

Respectfully submitted,



William J. Franklin
Attorney for Caraway Communications

cc: Caraway Communications

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Revision of Part 22 and Part 90 of the) **WT Docket No. 96-18**
Commission's Rules to Facilitate Future)
Development of Paging Systems)
)
Implementation of Section 309(j) of the) **PP Docket No. 93-253**
Communications Act -- Competitive Bidding)

To: The Commission

**COMMENTS OF
CARAWAY COMMUNICATIONS
ON AUCTION LICENSING PROPOSAL**

Caraway Communications ("Caraway"), by its attorney and pursuant to Section 1.415 of the Commission's Rules, hereby respectfully comments on aspects of the Commission's proposal to adopt auction licensing rules for commercial paging services.^{1/}

BACKGROUND

Caraway is an established firm responsible for the design and construction of communications sites for major companies across the country. As such, it is a well-established member of the communications industry. Caraway's President and founder is Mr. Dwayne Caraway, an experienced consulting RF engineer.

Caraway is filing these Comments on behalf of its clients, who are CMRS licensees with 929 MHz and 931 MHz paging systems at various locations around the country. In many cases, those clients have exclusivity rights for their systems. Those clients are in the

^{1/} Future Development of Paging Systems, 11 FCC Rcd ____ (FCC 96-52, released February 9, 1996) (WT Docket No. 96-18, PP Docket No. 93-253) (Notice of Proposed Rulemaking) ("NPRM").

process of building out those systems, a process which involves substantial investments of capital. Caraway is intimately involved with the technical and financial aspects of this system development. As such, Caraway has a special expertise to discuss the auction licensing rules from the perspective of start-up CMRS paging operators.

I. THE COMMISSION SHOULD PROVIDE INTERFERENCE PROTECTION BETWEEN INCUMBENT LICENSEES AND AUCTION WINNERS BASED ON EXISTING PART 22 CONTOURS.

As a threshold matter, Caraway favors the Commission's adoption of identical technical and interference standards in each frequency band for Part 22 and Part 90 paging systems. Specifically, all licensees at 929 MHz under Part 90 and all licensees at 931 MHz under Part 22 should have the same overall ERP and height-power limits, and should have the same rules for determining service and interference contours. To avoid tipping the playing field, both nationwide, regional, and local licensees should have the same standards.

However, Caraway supports the adoption of the Commission's existing fixed contour rules for authorized stations of both Part 22 and Part 90 licensees.^{2/} This would avoid the difficult legal problem of retroactively limiting the coverage contours for incumbent licensees.

Further, the Commission should recognize that "dead zones" will exist in irregular areas of the outermost interference contours and in interior "holes" of existing licensees. If existing licensees are absolutely prohibited from expanding their outermost contours, areas

^{2/} However, to give licensees the continuing flexibility to add or modify 929/931 Mhz stations, the Commission should permit its proposed formula to be applied solely for the purpose of an existing licensee's or auction winner's short-spacing of sites toward the others' contours.

will exist in which neither an incumbent licensee nor an auction winner can provide service.

A wooden application of a "no-expansion" rule simply does not serve the public interest.

For this reason, existing licensees must be permitted to expand their interference contours as of right on a primary basis to the extent that they can demonstrate that no other licensee (i.e., an auction winner) absolutely cannot provide service to an area using a transmitter covering a total of 130 square kilometers (50 square miles) of area (a) which is already served by the other licensee and its affiliates or (b) which is unserved. In other words, where only an incumbent can make an incremental service expansion, the Commission's Rules should permit the expansion.

Further, to the extent that an auction winner does not provide coverage throughout a market, adjacent incumbent licensees should have the right to provide such expanded service on a primary basis.

II. THE COMMISSION MUST HONOR EXISTING PART 90 CHANNEL EXCLUSIVITY IN PROVIDING 929 MHz INTERFERENCE PROTECTION.

As Caraway explained in its Comments on the Interim Licensing Rules, Section 90.495(c) of the Commission's Rules states that a proposed 929 MHz paging system that meets the criteria for channel exclusivity "will be granted exclusivity ... at the time of initial licensing." In other words, Section 90.495 awards the license a vested right to channel exclusivity at the time of initial grant.^{3/} Accordingly, until a 929 MHz licensee loses its

^{3/} While this exclusivity is subject to satisfaction of the construction requirements, so is every other exclusive license issued by the Commission. The Commission cannot seriously contend that a 800/900 MHz SMR licensee, a cellular licensee, or a PCS licensee lacks permanent channel exclusivity because it has not constructed its system. And yet, the type of notification for the completion of construction is identical for SMR and 929 MHz paging licensees, and substantially similar for cellular and PCS.

exclusivity rights by failing to construct sufficient paging transmitters or by failing to keep them operating, the Commission must recognize those exclusivity rights in making interference determinations with auction winners' co-channel systems.

As the Commission is well aware,^{4/} it is bound by its own rules until they are modified or repealed.^{5/} This is true even if the Commission is considering a modification of its rule, and has proposed to modify or repeal them in rulemaking proceedings. "[A]n adjudication which violates such rules cannot be defended on the basis of an explanation accompanying a proposed rules change"^{6/} Rather, "unless and until [an agency] amends or repeals a valid legislative rule or regulation, an agency is bound by such rule or regulation."^{7/} Thus, the Commission must continue to apply its 929 MHz exclusivity rules as adopted, and cannot "freeze" its implementation of those rules on the basis of the NPRM.^{8/}

Similarly, Section 316 of the Communications Act prevents the Commission from modifying 929 MHz licenses to eliminate exclusivity rights without satisfaction of the specific procedures set forth therein. For the specific reasons set forth above, the public interest will be better served if existing 929 MHz licensees are permitted to operate their systems free from harmful co-channel interference.

^{4/} See, e.g., Brief for Respondent Commission at 31-32, Suncom Mobile & Data, Inc. v. FCC, No. 95-1478 (D.C.Cir.).

^{5/} See, e.g., Reuters, Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C.Cir. 1986).

^{6/} American Federation of Gov't Employees v. FLRA, 777 F.2d 751, 759 (D.C.Cir. 1985).

^{7/} Id. See also United States v. Nixon, 418 U.S. 683, 694-96 (1974).

^{8/} See NPRM at 67 (¶148).

III. THE COMMISSION SHOULD AUCTION PAGING CHANNELS USING A VARIETY OF AREAS, INCLUDING REGIONAL AND LOCAL.

Caraway opposes the Commission's proposal to auction all paging channels using MTAs. This "one size fits all" approach is harmful to start-up businesses and does not serve the public interest.^{9/}

Just as it did with Narrowband PCS auctions, the Commission should auction 929/931 MHz licensees in a variety of sizes, including a few regional channels (using the same regions as Narrowband PCS), a few MTA channels, and the majority as BTA channels.^{10/} The Commission's auction rules should not overrule the marketplace's need for different levels of paging service.

^{9/} Further, Caraway notes that difficult legal issues exist where Part 22 VHF and UHF channels are used for two-way, rural radio, and BETRS purposes. Given the licensing diversity of those channels, perhaps the public interest would be better served if the present licensing procedures were followed.

^{10/} Adoption of MTA and BTA licensing should be conditioned upon Rand McNally extending its blanket FCC-related license on the MTA and BTA terminology to all paging channels at no additional cost to the industry. Rand McNally's profits from the Commission's action should come from sales of MTA and BTA definitional materials, and not from the backs of captive Commission licensees. If Rand McNally declines this approach (which after all recognizes its rights in the terminology), then the Commission should use Commerce Department Economic Areas in lieu of both MTAs and BTAs.

CONCLUSION

As set forth herein, Caraway respectfully requests that the Commission modify its proposed auction rules as set forth herein.

Respectfully Submitted,

CARAWAY COMMUNICATIONS

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